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DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-197872.2

DATE: October 9, 1981

MATTER OF: Meteor Communications Consultants, Inc.

DIGEST:

1. Contracting officer's decision to cancel solicitation after it was determined that communication system was no longer needed, based on, among other things, departmental-wide requirements and plan to establish nationwide system, was reasonable.
2. Government is not estopped to deny existence of contract with protester where record lacks clear evidence of any overt act by Government which might reasonably be construed as inducement to protester to incur costs by commencing its implementation plan prior to award.
3. In view of conclusion that contracting officer's determination to cancel the solicitation was reasonable, there is no basis to find arbitrary and capricious action by agency to support recovery of proposal preparation costs.
4. Agency, after major considerations have been enumerated as to why cancellation of the solicitation may be appropriate, should inform offeror of that possibility to enable the offeror to make the necessary informed business decisions, rather than delay 2 months.

Meteor Communications Consultants, Inc. (MCC), protests the Department of Energy's (DOE) cancellation of request for proposals (RFP) No. DE-RF01-79AD-10612. The RFP solicited for a Meteor Burst Emergency Communications System to provide for the interexchange of teletype messages between designated DOE offices. We find MCC's protest to be without merit.

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On February 14, 1980, MCC was selected for final negotiations, with the award of a contract expected around April 14, 1980. Approximately 1 week after MCC's selection, Systems Consultants, Inc. (SCI), filed a protest with our Office. MCC advises that on March 27, 1980, DOE stated that a contract would be awarded notwithstanding the protest filed at GAO. As a result, MCC, under its implementation plan, hired additional personnel and initiated plans to expand its facility. However, there were more delays and the award date slipped until, on June 26, MCC was advised that award would not be made until after GAO's decision. SCI's protest was denied on September 18, 1980. See Systems Consultants, Inc., B-197872, September 18, 1980, 80-2 CPD 203. Subsequently, MCC was advised that funds would have to be reprogrammed since award of a contract would not occur before Fiscal Year 1981.

Negotiations were scheduled to be held on December 2, 1980, with award anticipated by December 31, 1980. MCC states that at that time it "hire[d] two [additional] engineers and [a] draftsman in support of this contract's implementation plan." After the December negotiations, a new pricing structure was submitted by MCC at DOE's request. On February 4, 1981, DOE requested that additional pricing information be submitted by MCC and advised MCC that a contract would be awarded since this procurement was exempted from new budget reductions. DOE requested further pricing information on February 18, and by March 13 MCC contends that all contract details were resolved and approved by both parties. Notwithstanding the above, on March 17, 1981, MCC received verbal notification that DOE canceled the solicitation.

MCC contends that the cancellation was not in the best interest of the Government and was not justified. MCC maintains that the excessive amount of time taken for negotiations followed by the cancellation of the solicitation has resulted in MCC incurring what it believes to be unjust costs. MCC has requested that it be compensated for those costs, which include proposal preparation costs, even if the cancellation is found to have been proper. In addition, MCC submits that once there was the possibility of the Meteor Burst Project being terminated, based on funding or a

change in needs, it was DOE's duty to advise MCC of the possibility. MCC argues that this would have given them a clearer picture on which to base its decisions.

DOE explains that part of the delay in the negotiations was due to changes in the contract negotiator, a new pricing structure and the need for additional pricing information. It is DOE's position that while negotiations were held on an irregular basis, the negotiations were held with the intent to make an award. Moreover, DOE submits that it never advised the protester to hire employees or to incur any other costs relative to the start of this project.

Apparently, the issue of whether DOE should proceed with the Meteor Burst Project was first raised on or about January 7, 1981, by the Deputy Director of the Office of Computer Services and Telecommunications Management (CSTM). The initial concern was that DOE's emergency responsibilities were not clear. This was compounded by the uncertainties surrounding the change in administration. In response to this concern, DOE's emergency policy was reviewed in light of departmentalwide requirements and the trend toward the establishment of a nationwide system concerned with all Government emergency communications. We note that CSTM was not included in the planning effort for a nationwide system. The conclusion reached was that the Office of the Director of Military Applications (DMA), the office assisting DOE in the funding of this procurement, should be contacted to determine its current need for the meteor burst system. On March 17, 1981, a final decision was reached by DOE and DMA: the solicitation was to be canceled. The basis for the decision, while referring to unnamed technical and organizational events, appears to center on the roles of the Nuclear Regulatory Commission, Federal Emergency Management Agency and the National Communications System with respect to the establishment of an all-Government emergency communications system.

Our Office, in general, will not object to an agency's decision to cancel an RFP unless the protester shows that the decision, in light of the facts and circumstances of the particular procurement, clearly lacks a reasonable basis. See United States District

Court for the District of Columbia, 58 Comp. Gen. 451 (1979), 79-1 CPD 301. While the language of the Federal Procurement Regulations (FPR) does not provide specific guidance on the subject of canceling an RFP, our Office has stated that the principles directed at the cancellation of formally advertised procurements, reflected in FPR § 1-2.404-1 (2nd Edition, amend. 121, November 1973), are applicable to negotiated procurements. Moreover, we have noted that the contracting officer has broad powers of discretion in deciding when a solicitation should be canceled. Microfilm Communications Systems, Incorporated, B-180465, September 4, 1974, 74-2 CPD 140.

One of the enumerated bases for supporting the contracting officer's decision is when "the supplies or services are no longer needed." FPR § 1-2.404-1(b)(2). As noted above, DOE no longer needed the system because of the decision by other agencies to establish an all-Government emergency communication system. In these circumstances, we find the contracting officer's decision to cancel the RFP was reasonable.

In regard to the costs incurred pursuant to its implementation plan, MCC is, in effect, arguing that DOE led MCC to believe that it would be awarded a contract for the Meteor Burst Project, that MCC commenced its implementation plan in response to DOE's actions and that DOE, therefore, is estopped to deny the existence of a contract with MCC. We find the evidence to support MCC's contention to be insufficient.

The Government may be estopped to deny the existence of a contract with a bidder or offeror where the following four elements are all present:

1. The Government knows the facts;
2. The Government intends that its conduct shall be acted on or the Government so acts that the bidder or offeror has a right to believe that the Government's conduct is so intended;
3. The bidder or offeror is ignorant of the true facts; and

4. The bidder or offeror relies on the Government's conduct to his injury. (See Fowler's Refrigeration and Appliance, Inc., B-201389, March 25, 1981, 81-1 CPD 223.)

We have found an estoppel where the record provided clear and convincing evidence of all four of these elements. See System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159. Conversely, we have denied claims of estoppel where such evidence is lacking. See Fowler's Refrigeration and Appliance, Inc., *supra*.

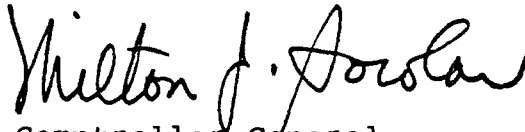
The record does not disclose any clear evidence of an overt action by DOE which might reasonably be construed as an inducement to MCC to commence its implementation plan prior to award of a contract. MCC's chronology of events merely sets forth, essentially, that MCC was periodically informed that award would be made to MCC. This is unlike the situation in Fink Sanitary Service, Inc., 53 Comp. Gen. 502 (1974), 74-1 CPD 36, and similar cases, where the agency gave a contractor a contract number and was aware of Fink's intention to purchase additional equipment. Moreover, it is not clear from the record whether DOE was ever advised or discovered on its own that MCC was commencing or had commercial implementation plans. In these circumstances, we find that the first and second elements of estoppel are lacking and must deny this portion of MCC's claim.

MCC also requests proposal preparation costs. We have held that these costs may be recoverable where it is shown that the Government's arbitrary and capricious action towards a claimant has denied the claimant fair and honest consideration of its proposal. See Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219. In the present case, for reasons previously indicated, we have found no basis for objection to the cancellation. Accordingly, there can be no grounds to find the existence of arbitrary and capricious action necessary to satisfy the standard for recovery of proposal preparation costs. This aspect of MCC's claim is also denied.

MCC's final argument is that once the possibility of project termination arose, DOE had a duty to inform MCC of that fact. While the record does not indicate the exact time when DOE began to question the need for the system, the first written document is the January 7, 1981, memorandum from the Deputy Director, CSTM. On January 14, 1981, pursuant to the questions raised concerning cancellation, DOE listed the major considerations involved in making such a determination and these considerations were sent to DMA for their input.

However, we do not see how MCC was prejudiced by DOE's failure to to inform MCC of the possibility of the project termination. By MCC's own admission, the last action to support MCC's implementation plan occurred on November 5, 1980, approximately 2 full months prior to the first indication in the record that DOE was considering cancellation of the solicitation.

MCC's protest is denied.

A handwritten signature in dark ink, appearing to read "Milton J. Sorolan". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Acting Comptroller General
of the United States